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Reducing Firearms-related Domestic Violence Injuries: Legal Developments and Policy and Practice Implications

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ABSTRACT

The potential dangers posed by a combination of firearms availability and domestic violence are substantial in the United States today. The dangers posed and resulting harms must be addressed as a pressing public health matter. This article reports on a 2016 United States Supreme Court decision that, although fairly narrow in terms of the technical legal question answered, supports broad public health implications for future policy and practice concerning the intersection of firearms regulation and the prevention or mitigation of domestic violence. Following a brief summary of the legal case, we make recommendations for reducing the incidence and severity of firearms-related domestic violence through improvements in the current legal standards governing firearms, law enforcement practices, and practices within the health care system.

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BACKGROUND

The potential dangers posed by a combination of firearms availability and domestic violence are substantial and create a significant set of public policy issues in the United States (U.S.) today (Sorenson, 2006). These issues might have multiple dimensions, including criminal justice, moral, socio-economic, and political concerns. The dangers posed and resulting harms must also be addressed as a pressing public health matter. In this article, we report on a 2016 decision of the U.S. Supreme Court that, although fairly narrow in terms of the technical legal question answered, carries broader implications for public health policy and practice concerning the intersection of firearms regulation and the prevention or mitigation of domestic violence. Following a brief summary of the legal case, we make recommendations for improvements in legal standards governing such cases, law enforcement practices, and responses by the health care system, all of which would be relevant in efforts to reduce the incidence and severity of firearms-related domestic violence injuries.

2016 Supreme Court Decision

The case of *Voisine et al. v. United States*, 136 S.Ct. 2272 (2016), involved a federal prosecution of Stephen Voisine stemming from his killing a bald

eagle (a legally protected endangered animal). Voisine had, at a previous time, pleaded guilty to assaulting his girlfriend in violation of the Maine Criminal Code, which (consistent with domestic relations statutes in two-thirds of the states) makes it a misdemeanor to “intentionally, knowingly or recklessly cause bodily injury” to another. When law enforcement officials later investigated Voisine for the bald eagle incident, they discovered the prior domestic violence conviction and his present ownership of a rifle. Voisine was prosecuted under 18 United States Code §922(g)(9), which criminalizes possession of a firearm by any person who has been convicted of a “misdemeanor crime of domestic violence.”

Congress originally enacted §922(g)(9) more than two decades ago in order to extend an existing statutory provision that already barred convicted felons from possessing firearms. As amended, the statute extended that prohibition to perpetrators of domestic violence who were convicted only of misdemeanors despite the harmfulness of their conduct. Section 921(a)(33)(A) defines the phrase “misdemeanor crime of domestic violence” to include a misdemeanor under federal, state, or tribal law that is committed against a domestic relation and that necessarily involves the “use...of physical force.” In 2014, the Supreme Court considered the scope of that

definition in a case in which the underlying, or predicate, conviction involved a “knowing or intentional” domestic assault. In *United States v. Castleman*, 134 S.Ct. 1405 (2014) the Court embraced a public welfare approach to the question of statutory construction and held that the word “force” in §922(g)(9) was broad enough to include unconsented-to offensive touching (in other words, a common law battery) and that “the knowing or intentional application of [such] force is a ‘use’ of force” for purposes of endangering actual and potential victims (Oliver, 2014; Corbin, 2015; Sack, 2015).

The new wrinkle presented in *Voisine* was the defendant’s argument that he was not subject to §922(g)(9)’s prohibition on firearms possession because his prior state domestic violence conviction (as the government conceded) could have been based on reckless, rather than knowing or intentional, conduct. Stephen Voisine pleaded guilty to misdemeanor assault after admitting he had slapped his girlfriend while intoxicated. Reckless conduct requires the conscious disregard of a known risk, even though it does not require that the reckless actor have the purpose or practical certainty that his or her conduct will cause harm. A 6-2 majority of the Court rejected the defendant’s attempted hair-splitting contention regarding *mens rea* or the perpetrator’s state of mind and held instead that committing an assault recklessly necessarily involves the “use...of physical force” and therefore falls within the Congressional intent and common sense meaning of §922(g)(9).

IMPLICATIONS FOR PUBLIC HEALTH PRACTICE

Guns and domestic violence are a lethal combination. One national study reports a high correlation between guns and murder in domestic violence cases, such that women who are threatened or assaulted with a gun or other weapon are 20 times more likely than other women to be murdered. When a gun is in the home, the victim is six times more likely than other abused women to be killed (Campbell, Webster, Koziol-McLain, Block, Campbell, Curry et al., 2003). Even if firearms are not used to kill a spouse, abusers use firearms to threaten victims and children by leaving them in plain view, pointing them at victims, and using them to rape victims or otherwise.

Prohibiting access to firearms when there is a domestic violence conviction is one way to reduce the risk of future lethal violence. There is evidence that limiting firearms access of domestic violence abusers has a positive effect on the safety of potential victims (Zeoli & Bonomi, 2015; Zeoli, Malinski, & Turchan, 2016; Webster & Wintemute, 2015). The Congressional amendments can be characterized as prophylactic in nature, a law designed to limit certain

firearms access by individuals already convicted for acts that pose a demonstrable danger; indeed, the law not only prohibits firearms possession among those with prior criminal convictions but also extends to any person who is subject to a final domestic violence civil restraining order. The federal law builds on statutes in every state that explicitly criminalize domestic violence and establish certain criminal enforcement procedures specific to domestic violence cases.

The Supreme Court has now contributed positively by broadly interpreting federal law in a manner consistent with the original intent of Congress, which was to reduce the risks posed to public safety by individuals who had been convicted of domestic violence offenses by keeping those individuals away from firearms. As explained by Justice Kagan for the Court majority: “Congress enacted §922(g)(9) in order to prohibit domestic abusers convicted under run-of-the-mill misdemeanor assault and battery laws from possessing guns. ... Nothing in the word “use”—which is the only statutory language either party thinks relevant—indicates that §922(g)(9) applies exclusively to knowing or intentional domestic assaults.” 136 S.Ct. 2278. In addition to preventing gun injuries to the public generally, a prohibition on gun ownership by individuals with domestic violence convictions also may reduce the likelihood of additional injuries to domestic violence victims. This is an important goal in light of findings that approximately half of domestic violence offenders are rearrested (Tara, Jennings, Tomsich, & Gover, 2014).

Historically, it was rare for domestic abusers to be arrested for crimes against their spouses. This crime literally was hidden behind closed doors. Neighbors, family and friends would not “interfere” with the so-called “private-family matter” of spouse abuse and it also was rare for professionals, including those in health care, to intervene on behalf of victims. It was not unusual for a physician to treat a domestic violence victim and send that victim back to an abusive home and spouse. Similarly, and regardless of how severe the violence was, law enforcement officers historically would tell offenders to take a walk around the block and cool off; rarely, if ever, did victims see any kind of justice system intervention or relief. Based on the prevalence rates of reported intimate partner violence, most frequently victims have been female and abusers have been male, but victimization of men in same sex or heterosexual relations certainly takes place and females also may be the abusers.

Over the past several decades and culminating in the passage of the Violence Against Women Act (VAWA) in 1994, Public Law. No. 103-322, the attitudes and justice system responses described above have shifted. Today, there is a much greater awareness of the prevalence and harm of domestic abuse, there are many resources available to help families and victims, and the justice system has come far in reversing its

prior “hands-off” response. The *Voisine* case is part of this movement forward because it closed a legal loophole, offering one more way for the state to hold offenders accountable. And, because it could mean a reduced presence of guns in the home, it also portends a reduced danger to victims, children, and other innocent third parties such as family members and coworkers.

Relevant here is the legal and societal context of domestic violence misdemeanor convictions, the lethal intersection between domestic violence and firearms, and the role played by health care professionals. Domestic violence crimes are part of a larger pattern of physical and emotional violence and intimidation. An actual conviction for any domestic violence act, whether felony or misdemeanor, is relatively rare considering the prevalence of domestic violence in society and the number of domestic violence incidents – both criminal and non-criminal – that occur daily. One in three women and one in four men have been physically abused by an intimate partner (National Coalition Against Domestic Violence, 2015).

Even with the many reforms and advances brought on since the passage and amendment of VAWA, the criminal justice system itself, where these crimes are processed, is far from perfect. It operates in a world of decreased resources for courts and law enforcement and is a place where the poor, minorities, and women often receive disparate treatment compared to others who have greater resources, including access to counsel. This same criminal justice system often minimizes the severity of domestic violence crimes. This occurs when, for instance, law enforcement investigates or charges abusive conduct as a misdemeanor when more serious felonies are present, or when prosecutors drop charges outright. It also happens when prosecutors bargain down serious felony charges to misdemeanors or refrain completely from charging any crime, choosing instead to “divert” offenders and drop all charges if they promise to successfully complete a “batterer’s intervention program” or other form of treatment.

Another reason domestic violence criminal convictions are rare is the high prevalence of witness intimidation by abusers of the victim. Today, part of effective prosecution strategy is to build a case that hinges on more than the testimony of the victim – in fact, “victimless prosecution” strategies were developed in direct recognition of the often-relentless intimidation and coercion by abusers of their victim-witnesses. Abusers threaten or make promises to never abuse again if the abused victim will refuse to testify, “drop” the case or, worse, lie on the stand to support the perpetrator. Faced with harm to herself or children, economic insecurity and other pressures, victims may recant testimony or refuse to participate with the state in its case. Many prosecutors are unable to overcome

this hurdle. The victim’s non-participation in the prosecution can result in fewer convictions of any kind, felony or misdemeanor. So, when there is an actual domestic violence conviction of any kind – including a misdemeanor such as in the *Voisine* case – it likely reflects a long, violent, and escalating history of domestic violence.

IMPLICATIONS FOR MEDICAL PRACTICE

The standard of care for health care professionals requires regular domestic violence assessment of patients because of the direct and dire impact that domestic violence has on patient health. This standard is endorsed by groups such as the Joint Commission in its mandated emergency room protocols, the U.S. Preventive Services Task Force, medical specialty organizations such as the American College of Obstetricians and Gynecologists, and premier advocacy organizations in their protocols and guidelines (Family Violence Prevention Fund, 2004). Recognizing and treating domestic violence is also a way to decrease the costs of health care overall, since domestic violence costs exceed \$5.8 billion annually and almost \$4.1 billion is spent annually just for direct medical and mental health care services (National Center for Injury Prevention and Control, 2003).

Knowing something about the wider societal and legal implications of the *Voisine* decision, particularly in light of the public health crisis of firearms-related domestic violence suicides and homicides (Johns Hopkins Bloomberg School of Public Health, n.d.), can assist health care professionals to form a broader perspective on their patients’ lives, knowledgeably discuss risks of firearms-related domestic violence with their patients, and make better and more effective referrals for assistance to hotlines and other domestic violence programs. There are several things that physicians and other health care providers can do to provide better, more informed, and supportive care on behalf of patients threatened with domestic violence, especially if firearms potentially are involved. First, they should routinely assess or screen for domestic violence in their regular patient interactions. Second, physicians should ask patients about the presence of and access to firearms if they know or suspect domestic violence is possible. Third, medical offices should post and provide materials to all patients on domestic violence helping agencies and resources, advice on how to be safe, and community and other resources, including the National Domestic Violence Hotline (1-800-799-SAFE; TTY 1-800-787-3224).

Fourth, physicians should know what their state laws require regarding mandatory reporting of domestic violence to law enforcement. Most states have some form of mandatory reporting: some provide for reporting when there are gunshot wounds or life threatening injuries, and others require reporting for any injury, however minor (Durborow, Lizdas,

O’Flaherty, & Marjavi, 2010). Though well intentioned, these laws can have a harmful effect on victim safety and patient autonomy. Some of these harms include: the triggering of retaliation by the perpetrator outright when the law enforcement is called, victims deciding not to seek care for fear of the perpetrator knowing she told someone and then escalating abuse of the victim or the children, decreased patient autonomy, and the violation of privacy and trust that the victim has with the health care provider – perhaps the only place where the victim can feel safe in disclosing violence. The physician should know the extent of reporting, if any, that is required, and know how to inform victims of their obligation to report injuries, *prior to* assessing for domestic violence, whether or not a firearm has been used.

Finally, the presence and circumstances of abuse need to be documented in the patient’s medical record. This should include threats or use of firearms.

Conclusion

The combination of firearms and domestic violence makes for a lethal mix in terms of potential peril to the public health. Federal statutes and regulations, as interpreted by the courts, are an important tool in the larger strategy to limit that peril. The law is an especially potent factor when it influences actual practice patterns in law enforcement and the health professions. The evolving progress in the three combined realms of law, law enforcement, and the provision of health services that this article comments upon must continue with full force if efforts to promote the public health by reducing the incidence and severity of firearms-related domestic violence injuries are likely to be successful.

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